



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION NO. 2 OF 2019

IN THE MATTER OF THE ESTATE OF NAZIR KHAN MOHAMED (DECEASED)

NASEEM NAZIR KHAN.....PETITIONER

VERSUS

SAIDA MOHAMED SWALEH.....OBJECTOR

RULING

1. The matter herein relates to the estate of Nazir Khan Mohamed, the deceased, who died on 16.8.17. A grant of probate of written will (the Grant) was on 7.6.19 issued to **Naseem Nazir Khan (the Petitioner), the executrix named in the will of the deceased.**

2. By a Summons dated 20.6.19, Saida Mohamed Swaleh, the Objector, seeks the revocation of the Grant on grounds that the proceedings to obtain the same were defective in substance in that when the Grant was issued, her Objection and Answer to Petition and Cross-Application were on record. As such, the Grant was issued irregularly before the hearing and determination of her objection.

3. The Objector avers that she is the 2nd wife of the deceased with whom she had 2 children. The Objector further avers that following the gazettement of the Petitioner's application for the Grant on 8.3.19, she did on 5.4.19 filed her objection to making of grant of even date, (the Objection). On 15.5.19, she filed an Answer to Petition and Cross Application dated 10.5.19. All these pleadings were placed on the Court file and also served upon the Petitioner. The Objector was therefore taken aback when she learned that the Grant had been issued to the Petitioner on 7.6.19. She believed that the Objection and Answer and Cross-Application were deliberately and conveniently removed from the Court file to show that there was no objection to the making of the Grant. In light of the foregoing, the Grant was issued contrary to law and is thus incurably defective. In the interest of justice and fairness that the Grant ought to be revoked.

4. The Petitioner opposed the Application in her replying affidavit sworn on 3.6.19. She stated that she was the sole wife of the deceased and had children with him. She was not, during the lifetime of the deceased, aware of any other marriage between the deceased and any other woman. The Chief Kadhi by a letter dated 15.3.18 stated that the marriage certificate exhibited by the Objector did not emanate from his office. She further stated that the Objector's children are not children of the deceased. The Petitioner claims that the Objector was employed by the deceased as a secretary at Tudor Water Sports. She was also married to a man working in the Middle East. To the Petitioner therefore, the Objector is a busybody with no interest in the estate of the deceased and therefore lacks *locus standi* to file an objection to the issuance of the Grant.

5. The Petitioner further averred that the notice of her application for the Grant was published in the Kenya Gazette on 8.3.19. No objection was filed within the 30 day notice period. She denied having been served with the Objection or the Answer to Petition or Cross Application. According to the Petitioner, after filing of the Objection, the Objector did not place the same in the Court file. As such, no one had knowledge of the Objection. The Petitioner urged that the Application be dismissed with costs for failure to meet the statutory threshold for revocation of a grant.

6. Parties filed submissions which I have considered. The issues that fall for determination are:

i. Whether the Objector has *locus standi* to seek revocation of the Grant.

ii. Whether the Grant was issued to the Petitioner in accordance with the law.

7. The ground upon which the Objector seeks revocation of the grant is that the proceedings to obtain the same were defective in substance. Section 76 of the Law of Succession Act which confers jurisdiction upon the Court to revoke and annul grants of representation provides in part as follows:

“76 A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a. that the proceedings to obtain the grant were defective in substance;

b. ...

Whether the Objector has *locus standi* to seek revocation of the Grant

8. The Objector claims to be a wife of the deceased and exhibited a copy of a marriage certificate. She also exhibited birth certificates of children she claims to have had with the deceased. The Petitioner on the other hand contends that the Objector was not a wife of the deceased and neither are her children, the children of the deceased. It is also her contention that the marriage certificate relied on by the Objector did not emanate from the Chief Kadhi's office and the birth certificates were only obtained with the aim of benefiting from the estate of the deceased. It was further submitted for the Petitioner, that a document examiner in a report dated 4.7.19 concluded that the signature in the Objector's marriage certificate is not similar to the known signature of the deceased. To the Petitioner therefore, the Objector has no *locus standi* to file the present application.

9. Section 76 of the Act provides that an application for revocation of a grant of representation may be made by *any interested party*. A party who makes an application under Section 76 of the Act must demonstrate to the Court sufficient interest to challenge a grant of representation. Black's Law Dictionary Tenth Edition defines "interested party as:

A party who has a recognizable stake (and therefore standing) in a matter.

10. Does the Objector have a recognisable stake in the matter herein that entitles her to contest the Grant? She claims to be a wife of the deceased and relies on the marriage certificate she exhibited. In his letter stating that the said marriage certificate was not from his office, the Hon. Chief Kadhi had directed that clarification be sought from Sheikh Ali Dharani, Assistant Registrar, who issued the said marriage certificate. It is not known if this clarification was sought as directed. Further, the alleged forensic report by the unnamed document examiner that the deceased's signature in the marriage certificate is different from his known signature, was not placed before the Court for consideration. Whether the Objector was married to the deceased or not, is a question of fact which may need to be proved by *viva voce* evidence. The case of Gachigi v Kamau [2003] KLR 169 cited by the Petitioner is not helpful at this stage as the question whether the appellant therein was married to the deceased was determined at a full hearing by way of *viva voce* evidence.

11. From the foregoing, my view is that the Objector's claim as a wife of the deceased and her claim on behalf of her 2 children, though disputed by the Petitioner, give the Objector a recognisable stake in this matter. Per the definition in Black's Law dictionary, she is an interested party. Accordingly, the Objector as an interested party, has *locus standi* as contemplated in Section 76 of the Act, to challenge the Grant.

Whether the Grant was issued to the Petitioner in accordance with the law

12. The gravamen of the Objector's application is that the Grant was issued notwithstanding that she had filed the Objection and an Answer to Petition and Cross-Application. The record shows that the notice of the Petitioner's application for the Grant was published in the Kenya Gazette on 8.3.19 pursuant to the requirement in Section 67 of the Act and Rule 7(4) of the Probate and Administration Rules (the Rules). The Objector filed her Objection on 5.4.19, while the Answer to Petition and petition by way of Cross-Application were filed on 15.5.19. The Grant was issued on 7.6.19.

13. Section 68 of the Act and Rule 17 of the Rules make provision for the filing of objection by a party seeking to challenge an application for a grant of representation. In particular, Rule 17(1) of the Rules provides:

Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.

14. In the present matter, the period given in the notice in the Kenya Gazette was 30 days from 8.3.19. The Objector filed her Objection on 5.4.19 which was within the period specified in the notice.

15. Section 69 of the Act stipulates the procedure after an objection has been filed as follows

1. Where a notice of objection has been lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.

2. Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.

16. It is clear from the foregoing provisions, that where as in the present case, an answer and cross-application are filed, the Court may not issue a grant but must proceed to determine the dispute.

17. At the time the Grant was issued on 7.6.19, the Objection and an Answer and Cross-Application filed by the Objector were not in the Court file. The Court then proceeded to issue the Grant. It remains a puzzle why these documents were not in the Court file or where they were placed after filing or indeed by whom they were removed from the Court file. Be that as it may, the Objection has a date stamp of 5.4.19 and the Answer and Cross-Application have a date stamp of 15.5.19, while the Grant was issued on 7.6.19. As such, the Court was under an obligation to determine the dispute before issuing the Grant. Given the circumstances of the case, I am satisfied that the Grant was issued unprocedurally.

18. In the end the Court finds that the statutory grounds for revocation of the Grant have been established. As demonstrated herein, the proceedings to obtain the Grant were defective in substance. It follows therefore that the Grant cannot stand. Accordingly, the Grant of Probate of Written Will issued to Naseem Nazir Khan on 7.6.19 is hereby revoked. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA 5th day of May 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Objector**

..... **for the Petitioner**

..... **Court Assistant**